IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1231

FOREST E. LEVERS, Administrator, etc., *Petitioner*,

v.

A. V. ANDERSON, District Supervisor, Alcohol Tax Unit, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HUSTON THOMPSON,
HUGH H. OBEAR,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

TABLE OF CASES CITED.

STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .

FOREST E. LEVERS, Administrator, etc., *Petitioner,*

v.

A. V. ANDERSON, District Supervisor, Alcohol Tax Unit, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petitioner, Forest E. Levers, special administrator of the assets of a partnership formerly consisting of Forest E. Levers and Ray E. Levers, deceased, duly appointed as such by the Probate Court of Chaves County, New Mexico, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered in the above cause on the 12 day of March, 1946.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 458) is not yet officially reported, nor is the order of that court overruling a petition for rehearing officially reported.

They are found at pp. 458, 465 of the Record.

The orders of the District Supervisor are found at pp. 421, 424, 426 of the Record.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on the 12th day of March, 1946 (R. 458). The petition for a rehearing was overruled on the 27th day of March, 1946. (R. 465).

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

Heretofore this Court allowed certiorari (325 U. S. 844) and reversed the Circuit Court of Appeals (Advance Sheets SCUS Reports, 90 Law Ed. 22). Upon remand the Circuit Court of Appeals dismissed the appeal on the merits, upon the grounds stated in the opinion (R. 458).

QUESTIONS PRESENTED.

1.

Whether petitioner acting as a duly appointed, bonded and qualified officer of a court of New Mexico is deprived of his constitutional rights under the twenty-first Amendment to the Constitution of the United States where he is ordered by said court to carry on, as an administrator for said court, the assets of a former partnership and estate, half of which assets belong to the estate, to sell and distribute in intrastate liquors, beers and wines belonging to said partnership and estate, when the officials of the Alcohol Administration cancel his Federal permit and refuse to issue new permits to do a wholesale business within the State of New Mexico.

2.

Whether petitioner being a duly appointed, bonded and qualified officer of a state court, and placed in charge of the assets of a former partnership as administrator by a state court, can be held responsible for the alleged acts of his predecessors in violation of the provisions of Sections 5(a) and 5(b) of the Alcohol Administration Act (27 U. S. C. A., Sec. 205) to the extent that, as administrator of the said partnership assets, his Federal permit for the sale of liquors, wines and beers belonging to said partnership and estate is cancelled, and permits for carrying on a wholesale business within the State of New Mexico with respect to said former partnership assets and assets of said estate are denied.

3.

Whether petitioner violates the Federal Alcohol Administration Act where the record in no way mentions or refers to the doing of an interstate business and where the transcript of the record does not indicate any direct effect or injury on any interstate shipments, and where the commodities sold by petitioner come to rest in the State of New Mexico, and being in possession of petitioner are distributed by petitioner to retailers within the state under the orders of the state court.

4.

Whether the Circuit Court of Appeals gave due consideration and effect to the provisions of the Twenty-first Amendment in relation to the liquor laws of the State of New Mexico.

5.

Whether the Circuit Court of Appeals gave due consideration and effect to the fact that the conduct of the entire business of petitioner was under the direction and control of a State Court.

6.

Whether petitioner was denied administrative due process because of the extreme severity of the punishment inflicted by the District Supervisor in relation to the lack of gravity of the misfeasance charged.

7.

Whether, under the facts of this case, the action of the District Supervisor in annulling petitioner's permit and in declining to grant the application for two additional permits was not arbitrary and capricious.

STATEMENT OF FACTS.

For approximately twenty years prior to the beginning of this proceeding Forest E. Levers and his brother Ray E. Levers, deceased, were in the business of selling and distributing distilled spirits, wine and malt beverages, covering a period before and after Prohibition, and from March 21, 1936, had a wholesaler's permit No. P-8482 under the Federal Alcohol Administration Act (Act of August 29, 1935, Ch. 814; 49 Stat. 977; 27 U. S. C. A. 201 as amended hereinafter called the Act) and regulations thereunder until October 1, 1941, in the name of Levers Brothers (R. 153).

On October 1, 1941, Ray E. Levers died (R. 154), and upon petitioner's petition he was appointed by order of the Probate Court of Chaves County, dated October 6, 1941 (R. 166, 167) special administrator of the estate of Ray E. Levers, deceased, " . . . insofar as the partnership assets in the firm of Levers Brothers is concerned" (R. 166). As said special administrator he qualified by posting surety bond in the sum of $25,000. He was directed and empowered by the Court to continue the business which had been known as Levers Brothers (R. 167). Thereafter, on October 10, 1941, upon application of the deceased's widow,

Oran C. Dale, son-in-law of Ray E. Levers, was appointed co-administrator with petitioner (R. 168, 169), with a surety bond of $25,000.

The co-administrators applied for and were granted on December 26, 1941 (R. 170) a wholesaler's basic permit No. 13-P-37, which permit was subsequently annulled and the annulment of which is at issue herein.

Thereafter, Oran C. Dale, having been drafted into the United States Army, resigned as co-administrator and was discharged as such by the Probate Court (R. 179), and it became necessary for petitioner to apply for new permits.

Thereupon petitioner as co-partner and special administrator of the estate of Ray E. Levers applied on November 29, 1943, for wholesaler's basic permit to be designated as 13-P-66, and on the same date also applied for an importer's basic permit to be designated as 13-I-12. The aforesaid applications (Nos. 13-P-66 and 13-I-12) were applied for because of the retirement and discharge of said Oran C. Dale from the position of co-administrator (R. 171-177).

At the time of making application for permit 13-P-37 and at all times thereafter, Forest E. Levers, administrator of the estate of Ray E. Levers and Oran C. Dale, and their successors as administrators of the estate of Ray E. Levers, the said partnership assets were under the jurisdiction of the Probate Court of Chaves County, New Mexico and they were "*directed and empowered to continue the business known as Levers Brothers in the ordinary manner, to purchase necessary merchandise, or equipment, and to disburse funds from the said partnership account . . .* " and were ordered to keep "*accurate records of all acounts for submission to and approval*" of that Court. (R. 166, 167)

Petitioner purchased in wholesale quantities all of its liquors, wines and beers from manufacturers outside of the State of New Mexico. The purchases were delivered to depots of petitioner at Hobbs and Roswell, New Mexico where the commodities came to rest. From thence they

were sold and distributed in retail within the State of New Mexico.*

During the aforesaid time, petitioner and his associate administrator made reports to the Federal Alcohol Administration at ~~Albuquerque, New Mexico~~ Denver, Colorado, showing the amount of aforesaid commodities received, their sale and distribution to parties named within the State of New Mexico. Similar reports were made at stated times to the liquor authorities of the State of New Mexico.

The State of New Mexico has an "Intoxicating Liquors Act" (Chapter 61, pages 105-1026, New Mexico Statutes, 1941) and at all times since the dissolution of partnership and the application for permit No. 13-P-37, petitioner and his associate administrator were subject to and responded to the requirements of said Act.

On November 5, 1943, respondent, District Supervisor, acting pursuant to Section 4 (e) of the Act, issued an order to show cause why the basic permit issued on December 26, 1941, should not be annulled (R. 146).

The order to show cause why the wholesaler's basic permit should not be annulled charged that the permit was subject to annulment under Section 4 (e) (3) of the Act because obtained by concealment and misrepresentation of material facts relating to the ownership or control of another corporation and to the ownership or control, in violation of Sections 5 (a) and 5 (b) of the Act, of outlets selling alcoholic beverages at retail (R. 146-148).

On December 18, 1943, pursuant to Section 4 (b), respondent issued a notice of contemplated denial of each of the two above described applications (R. 180, 191, 198).

The basis of the charge made in each of the notices of contemplated denial (R. 180-181, 191-193) was that *the evidence in the pending annulment proceedings was persuasive* that the business proposed to be carried on would not be maintained in conformity with law.

In a letter to petitioner giving more fully the reasons for the contemplated denial of petitioner's applications for

---

* Some merchandise was sold in Texas from the Hobbs Branch. Texas dealers did their own hauling from Hobbs. (See Record page 306)

basic permits, the respondent stated that petitioner's business practices result in control of certain retail outlets for spirits, wines or malt beverages in the State of New Mexico, that such control "affects the purchasing policies of these outlets" as to liquors moving in interstate commerce, and that "Levers Brothers would continue to control the path" of such liquor to their own advantage and the disadvantage of others (R. 198-199).

Petitioner requested a hearing on the order to show cause why the wholesaler's basic permit issued December 26, 1941, should not be annulled and on each of the notices of contemplated denial. The hearings in the three proceedings were consolidated (R. 4-6). After the hearing, the Hearing Officer made a consolidated report containing findings of fact that petitioner had made the misrepresentations charged (R. 377-421). These findings were adopted by the District Supervisor, who then issued an order of annulment, an order denying the application for wholesaler's basic permit, and an order denying the application for an importer's basic permit (R. 421-427).

Basic permit 13-P-37 was annulled on April 5, 1944, and the two applications for permit 13-P-66 and 13-I-12 were denied on the same day (R. 421, 422, 426).

By reason of the annulment of the basic permit 13-P-37 and refusal of the applications for basic permits 13-P-66 and 13-I-12 the said business was threatened with extinction.

The order annulling basic permit No. 13-P-37 on April 5, 1944, was a final order (R. 421, 422, 428).

Throughout their long continuance in the aforesaid business of selling and distributing distilled spirits, neither the petitioner nor Levers Brothers nor Ray E. Levers had ever been convicted of a felony or misdemeanor under a Federal or State law, nor had a permit ever been suspended or revoked for any violation of the Federal Alcohol Administration Act or of the regulations thereunder. Nor had any of the parties been charged with violation of any of the Liquor Laws of the State of New Mexico.

STATUTES INVOLVED.

Applicable portions of the Federal Alcoholic Administration Act (49 Stat. 977, 27 U. S. C. 201) and of the New Mexico Statute of 1941 (Chap. 61, Sections 504-514-518, 911, 912, 914) involved in this case are set out in appendices B and C respectively.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that petitioner violated the Federal Alcohol Administration Act.

2. In holding that the Federal supervisor had the authorty to cancel basic Permit No. 13-P-37 and to refuse to grant to petitioner basic permits for the conducting of a wholesale liquor business in the State of New Mexico.

3. In holding that petitioner restrained and prevented transactions in distilled spirits by the other wholesalers in the State of New Mexico and distillers and distributors in other states.

4. In holding that petitioner's transactions had a direct effect upon interstate commerce.

5. In holding that petitioner, an official of a New Mexico court of competent jurisdiction, could be deprived of his rights under the Twenty-first Amendment of the Constitution when he was carrying out the order of the said court in administering the liquor business of a former partnership and estate that were under the jurisdiction of the said state court.

6. In holding that petitioner was doing an interstate business when the commodities which he sold had come to rest in the State of New Mexico and, being in the possession of distributors, were being sold and distributed to retailers within that state under the orders of the state court.

7. In holding that petitioner could be chargeable with the alleged acts of those conducting the liquor business in the form of a partnership in the State of New Mexico under the authority of the said state court when that partnership had been dissolved by death and an administrator appointed by the state court had charge of the assets of the said partnership and was administering them under the order of the said court.

8. In affirming the action of the District Supervisor.

REASONS FOR GRANTING THE WRIT.

The granting of the writ in this case is of paramount importance for the following reasons:

I.

The decision of the Lower Court subordinates the liquor laws of the State of New Mexico to those of the Federal Alcohol Administration Act where intra-state commerce only is directly involved.

II.

The decision of the Lower Court is in direct conflict with the opinion and policy expressed by this Court in the *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293.

III.

The decision of the Lower Court by sustaining the annulling of petitioner's permit No. 13-P-37 and refusing to grant petitioner application for permits Nos. 13-P-66 and 13-I-12 to do a wholesale liquor business in said state has the direct effect of preventing the importation of liquors that come to rest, from being sold under the orders of the Court of Competent Jurisdiction of the State, and thereby does violence to the laws of the State and the rights of a citizen under the Twenty-first Amendment to the Constitution. The decision of the Lower Court has failed to recog-

nize the procedure provided by the State Court under the supervision and jurisdiction of the Court in the protection of intra-state business.

IV.

The decision of the Lower Court in its hypothetical dicta in the opinion assumes a "direct touch" or effect on interstate commerce when the record is void of a direct effect.

V.

The extreme severity of penalties about to be inflicted by the supervisor bear no relation to penalties inflicted in other cases of a like character, and the action of the supervisor, considering the lack of gravity of offense charged, is arbitrary and capricious. Petitioner will, in effect, have been denied due process of law, if they are enforced.

VI.

The decision of the lower court bases its hypothetical effect on interstate commerce, in great part, on the ground that the alleged practices of Levers Brothers, with respect to retail sales, dominated a "*substantial*" number of retailers, whereas out of more than approximately eight hundred sixty retailers in the state, only seven are charged in the record with being dominated by petitioner.

VII.

The Circuit Court of Appeals failed to give proper effect to applicable decisions of this court, namely:

Board of Equalization v. *Young's Market Co.*, 299 U. S. 59, 62

Joseph S. Finch & Co. v. *McKetterick*, 305 U. S. 395

United States v. *Frankfort Distilleries*, 324 U. S. 293, 298.

VIII.

Because of the importance of the question involved in the administration of the liquor laws of the United States in their relation to the laws of the several states making provision for effective sale of liquors within their borders.

CONCLUSION.

Wherefore, petitioner respectfully prays that the writ of certiorari may issue.

HUSTON THOMPSON,
HUGH H. OBEAR,
Attorneys for Petitioner.

Dated at
Washington, D. C.,
May 15, 1943.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .

FOREST E. LEVERS, Administrator, etc., *Petitioner,*

v.

A. V. ANDERSON, District Supervisor, Alcohol Tax Unit, *Respondent.*

BRIEF IN SUPPORT THEREOF.

I.

THE DECISION OF THE LOWER COURT SUBORDINATES THE LIQUOR LAWS OF THE STATE OF NEW MEXICO TO THOSE OF THE FEDERAL ALCOHOL ADMINISTRATION ACT WHEREIN INTRA-STATE COMMERCE IS INVOLVED, AND IS IN CONFLICT WITH THE LANGUAGE AND POLICY EXPRESSED IN THE UNITED STATES v. FRANKFORT DISTILLERIES, INC., 234 U. S. 293.

The question of law raised here is so intermingled with the facts that restatement to some extent is necessary.

Petitioner was doing a wholesale liquor business within the State of New Mexico and had receiving and distributing depots at Roswell and Hobbs, New Mexico. Both places were under New Mexico licenses (Exhibit 154, Tr. 366). Petitioner bought the commodities from producers outside

of the State as there were no producers in New Mexico. They were shipped by the producers across the State line and came to rest at either depot. From there they were sold and distributed by petitioner to retailers within the State. All matters involved in this case relate solely to *retail* sales.

The partnership was dissolved by the death of Ray Levers on October 1, 1941. Petitioner and Oran C. Dale were then appointed co-administrators by the Probate Court of Chaves County, New Mexico and "*directed and empowered to continue the business known as Levers Brothers in the ordinary manner, to purchase necessary merchandise, or equipment, and to disburse funds from the said partnership account . . .*" and were ordered to keep "*accurate records of all accounts for submission to and approval*" of that Court.

Up to this time, and for approximately twenty years previous, excluding the prohibition era, the partnership had been doing liquor business within the State. From 1935 they had a Federal wholesale liquor license.

When the State Court appointed the co-administrators, they inquired of the Federal Alcohol Administration, sometimes herein called FAA, as to the securing of a new license because of the change in the management, and the FAA thereupon forwarded application papers for execution by the co-administrators. These papers were filled out and executed, and the co-administrators were granted a wholesaler's permit No. 13-P-37 on December 26, 1941.

At the time of making application for administration in the Probate Court, and prior thereto, there existed a very complete and detailed State liquor law to which petitioner had responded by applying for and being granted, after investigation by State officials, two contemporaneous State licenses. (For Extracts therefrom believed pertinent, see Appendix C herein.)

The State laws comprehended complete procedure for and surveillance of all the acts of petitioner, both as to the

partnership and as to their successors, the co-administrators of the Court.

The State has made no protest nor brought any action to annul the permit granted to an officer of one of its courts. On the contrary, from the time that the state court took jurisdiction of the business in question on October 7, 1941, it has had petitioner under a $25,000 bond to carry on the business and to make regular reports to it.

Under these circumstances, has the Lower Court the right to say to petitioner that the FAA may refuse to permit liquors to cross the State line on behalf of petitioner and when the commodity has come to rest administrator cannot distribute it intra-state? Has the Court the right to say in substance, "You have asked the FAA for a license, but you cannot have one even though you are under the process of the State Court, because the FAA believes that Ray Levers, a partner, now dead, and you, a private individual, made some misrepresentations upon which you secured a permit in 1935." Or can the Circuit Court of Appeals say, when two co-administrators of the State Court ask for permit No. 13-P-37, and it was granted, that it can be annulled because of alleged acts preceding the appointment of these co-administrators?

Finally, can the FAA and the Lower Court say to the administrator, despite the fact that the same parties are not before them and that there is a State Law covering all questions of sale and distribution intra-state and that a State Court is supervising all this business, "We are going to stop you from selling in the State by refusing to give you a Federal permit which would be the only means of your obtaining goods outside of the State, simply because we believe that your predecessors in business made a misrepresentation with respect to ~~five or six~~ seven retail outlets in the State where there are approximately 860"?

What the Lower Court has said in substance is: "We sustain the annulment of the Federal permit and the refusal to grant new ones on three grounds, (1) "it makes no difference whether there is a State law" we do not think

that the State law should prevail in this case, (2) nor do we think that the fact that a State Court, under a State law, has entire control of the sale and distribution of petitioner's commodities in the State makes any difference; (3) We think that interstate commerce is affected substantially because of the alleged acts of petitioner's predecessor in control of the business" *might* affect the business of other producers outside of the State from getting their share of the business within the State, and (4) we think "the business that *might* be taken away from competitors outside of the State is substantial."

With respect to the domination of the FAA over the State Law and its enforcement, the Circuit Court of Appeals has referred to United States v. Frankfort Distilleries, Inc., and two other cases. An examination of the Frankfort case shows that it is based on facts entirely different from those in the instant case. In it, the contention arose over the attempt of a group of liquor interests outside of the State of Colorado, in conspiracy and combination, attempting to maintain intra-state prices within the State, in violation of the Sherman Anti-Trust Act, with the effect of restraining interstate commerce. Therefore it does not apply as far as interstate commerce is concerned.

However it is to be noted that in the Frankfort case, the Court declared that since the Twenty-first Amendment to the Constitution was enacted there has been a fundamental change as to the control of liquor traffic in the State, and that because of the Twenty-first Amendment, the power of the State to control the traffic in liquor within its borders is paramount.

Finally, should not all matters relating to the *retail* sale of liquors within the State of New Mexico be left to regulation by and through the comprehensive laws of that State upon the subject?

Concluding upon the subject under this heading, it is obvious that the Circuit Court of Appeals and the supervisor have subordinated the liquor laws of New Mexico to

those of the FAA where intra-state commerce is actually involved, and in doing so, have taken a position in conflict with the opinion in United States v. Frankfort Distilleries, Inc.

II.

THE DECISION OF THE LOWER COURT ASSUMES AND BASES ITS OPINION UPON "A DIRECT TOUCH" OR DIRECT EFFECT ON INTERSTATE COMMERCE, WHEN THE EVIDENCE SHOWS THAT THERE WAS NO SUCH DIRECT TOUCH OR EFFECT.

The lower Court's opinion asserts under Section 5 (a) and (b) of the Act on the subjects of "Exclusive Outlet" and "Tied Houses," where there were only seven retail establishments in New Mexico, involved, that the sales were made to the exclusion of the commodities sold "*by other persons in interstate or foreign commerce.*"

On this subject, the Court's opinion said,

> "Obviously, if one wholesaler in New Mexico so dominates a substantial number of retail dealers that such retail dealers are compelled to purchase substantially all of their distilled spirits from such wholesaler, such practices will restrain and prevent transactions in such distilled spirits between other wholesalers in the State of New Mexico and distillers and distributors in other states."

The Court continues to say,

> "Moreover, it is not to be doubted that, in many instances, distilled spirits procured outside the state of New Mexico by wholesalers to fill prior orders of retail dealers are delivered to such retail dealers *with only a temporary pause at the warehouse of the wholesaler which interrupts,* but does not terminate, the interstate journey of the goods. In such a situation there is a practical continuity of movement from the distiller or distributor without the state to the retailer within the state of New Mexico. The practices engaged in by Levers Brothers and Forest E. Levers would restrain such transactions in interstate commerce."

The statement upon which the Court bases its opinion is not founded upon the record. It may be possible to assume a series of events where interstate commerce might be substantially affected within the State and bring the situation within the Federal Alcohol Administration Act. But the facts were here as follows.

There were no manufacturers or producers within the State. Therefore, all commodities had to be brought from without the State. Hence there would not be any interference between one wholesale distributor and another within the State, because of any liquors produced within the State.

As to those brought from without the State, there is no evidence or charge whatsoever that there was a conspiracy, outside the State, to interfere with such products crossing the State line. In fact, the Court should note that there was no charge here of a violation of interstate commerce before the supervisor. There was only the charge of making misleading statements with respect to retailers (standard Liquor Stores, Inc., and its seven distributors were retailers) within the State. They were purchasing goods that had come to rest within the State, and there were only five of them involved out of approximately 860 retailers in the State.

It is respectfully submitted that the word "substantial" is not supported when the claim is thus limited to only seven retailers. (See Official List of Licensed Liquor Dealers of the State of New Mexico.)

The documents which the Supervisor introduced in evidence (Exhibit 154, Tr. 366) show that the commodities came to rest, at either the Roswell or the Hobbs branch of petitioner, in New Mexico. The goods were then "sold at the Hobbs branch" or "the Roswell branch where the Government forms are maintained and entries thereto made." Hence the opinion of the Lower Court, where it supposes that the commodities are bought by petitioner "with only a temporary pause at the warehouse of the wholesaler," is not founded upon the record and there is no interstate commerce involved, since the charge of misleading begins only

after the commodity is to be distributed from the two branches, when the business is all intra-state.

If the Court's supposititious case does not stand up, then its conclusion, that the practices engaged in by Levers Brothers and Forest E. Levers would restrain such transactions in interstate commerce, becomes mere dicta.

Moreover, the fact that only intra-state business is involved is further demonstrated by the fact that all transactions of petitioner were supervised and controlled and under the order of a State Court having jurisdiction over the property.

Finally, the Court's conclusion that there were a substantial number of retailers affected can hardly be sustained, when only seven are claimed to have been interfered with, and the record shows that all of those seven were being sold to under State licenses, and that they were only an infinitesimal part of retail outlets of the State.

III.

THE EXTREME SEVERITY OF PENALTIES ABOUT TO BE INFLICTED BY THE SUPERVISOR BEAR NO RELATION TO PENALTIES INFLICTED IN OTHER CASES OF A LIKE CHARACTER, AND THE ACTION OF THE SUPERVISOR, CONSIDERING THE LACK OF GRAVITY OF OFFENSE CHARGED, IS ARBITRARY AND CAPRICIOUS AND PETITIONER WILL, IN EFFECT, HAVE BEEN DENIED DUE PROCESS OF LAW, IF THEY ARE ENFORCED.

There is no dispute that if the penalties about to be enforced on petitioner are exacted, a large and going business will be extinguished.

Under certain circumstances such a drastic penalty might be justified. For example, if the parties who obtained a permit were found to be criminals who had been convicted under Federal or State law; or were notorious bootleggers; or there was a corporation whose president and chief stock-

holder, in control of a company, had violated the law, been convicted and then the president had sold his stock and control of the company to other notoriously many-times convicted parties, so that the control of the company passed from one group of crooks to another group of crooks, the supervisor would in such cases be justified in annulling the permit and refusing new ones. This would not be arbitrary or capricious, because it would be dangerous to have people with criminal records in charge of liquor business.

Let us contrast the facts in the instant case. Neither Mr. Levers nor his deceased brother, Ray Levers, had ever been convicted of a felony or a misdemeanor either under a Federal or a State law. Nor had any permit of theirs been suspended or revoked for violation of the Federal Alcohol Administration Act. Nor had the parties been charged with the violation of the liquor laws of the State of New Mexico or their licenses thereunder revoked, though they had been in the business for twenty years.

Now a sudden complete change of position occurs. Ray Levers dies. His brother and his widow apply to the Probate Court of Chaves County, New Mexico for administration of the estate and the business of Mr. Ray E. Levers. The Court grants the petition and after hearing appoints Mr. Forest E. Levers and Mr. Oran C. Dale as co-administrators, orders them to conduct the business under its supervision, requires each of them to put up a bond of $25,000 for conducting the business properly and orders them to report regularly to the Court as to the conduct of the business.

All of these facts, the record shows, were known to the Federal Supervisor, as well as to the State Officials supervising this particular liquor business. In addition to this, there existed a complete State law covering all the actions of petitioner under which he was required to take out licenses, and did; and under which he was to respond by report regularly, and did.

In addition, the complaint here is not of being criminals and lying about it, or doing criminal acts, but merely attempting to make "exclusive sales" to seven retail outlets, or to apply what is known as "Tied House" restrictions to them, all of which could have been handled under the State law, and if necessary, by application to the State Court.

We respectfully suggest that if the circumstances are as we have said above, that the thing to do would, in the event that the Federal Supervisor thought there were violations by way of exclusive sales or "Tied House" contracts, have been to bring this matter to the attention of the Court and had petitioner removed as an administrator. But instead of this, the Supervisor, now sustained by the Lower Court, has gone to extreme limits, the like of which do not appear in any case that we have examined, and he is about to punish this official of a Court with a punishment so condign that it will annihilate the business of an estate as well as a business that is under the surveillance of a State Court.

We know of no similar case where there has been a punishment inflicted of more than a suspension. In annulling the existing permit and refusing to grant applications for other permits, is under the circumstances arbitrary and capricious.

Furthermore, in view of the fact that the whole situation is under the State law, and within the State Court, and petitioner cannot secure any of his products if this order is carried out, he is being denied due process of law. This drastic "death sentence" is surely not warranted by the circumstances of this case. It is an abuse of administrative discretion and power.

In order that this Court may have the benefit of a comparison of the punishments inflicted in other cases involving liquor transactions with that in the instant case, petitioner has made an analysis and contrasted them in Appendix A of this brief. Petitioner urgently asks this Court to review the cases in this Appendix.

IV.

THE CIRCUIT COURT OF APPEALS FAILED TO GIVE DUE CONSIDERATION AND EFFECT TO THE FACT THAT THE CONDUCT OF THE ENTIRE BUSINESS OF PETITIONER WAS UNDER THE DIRECTION AND CONTROL OF A STATE COURT AND STATE LAWS.

The State of New Mexico has enacted an exhaustive Intoxicating Liquors Act that covers all the matters presented in the sale and distribution of liquors by petitioner (Intoxicating Liquors Act of New Mexico, Chapter 61, pp. 105-1026, New Mexico Statutes, 1941).

The Alcohol Administrator, in the hearing before the official representing him, sought to establish an alleged continuing practice of exclusive outlet and "Tied House" agreements or enforcements without giving any consideration to this Law or the acts of the State Courts.

After Ray Levers had died and the partnership dissolved, and when the jurisdiction of the Probate and other State Courts had been invoked for carrying on the business of the petitioner and for its protection, respondent sought to show that there was still a continuing practice of exclusion and restraint by petitioner. However, the Probate Court did have jurisdiction of the business of the *partnership* assets and estate, according to the record, and it was under its orders that petitioner proceeded when he asked for Permit No. 13-P-37.

In addition to the jurisdiction of the Probate Court, petitioner has set forth, under Appendix C of this brief, some of the essential paragraphs of the New Mexico Liquor Law. For example, no wholesaler could sell alcoholic liquors to any person other than the holder of a New Mexico wholesaler's, retailer's, dispenser's or club license. Nor could a person receive a license from the State who had been convicted of a felony or convicted of two separate misdemeanor violations of the State liquor act in any cal-

endar year nor could a wholesaler sell or ship alcoholic liquors *not received at, and shipped from,* the premises specified in such wholesale license, except beer, as provided in Section 705. In other words, *imported liquors had to come to a rest in the State before they could be put out for sale or distribution in retail.*

If a person desired to quit business or if a licensee died, the stock of liquors could be sold to any other retailer, dispenser or club, or to any New Mexico wholesaler, *without the seller thereof incurring any criminal or civil liability* under the provisions of this Act (Laws, 1939, Chapter 236, Section 1501, p. 566). A repossession of any stock of alcoholic liquors by a licensed New Mexico wholesale liquor dealer, or the repossession of any alcoholic liquors from any New Mexico wholesale liquor dealer is not a violation of the said New Mexico Laws.

Finally, the law states that under certain conditions (Chapter 61, p. 911 (C) (4)) spirituous liquors, beer or wine could be sold by any officer under the order or direction of Court and not be a violation of the New Mexico Statutes.

In the instant case, the Court will observe from the record that after the State Court took over the supervision of the aforesaid liquor business the Standard Liquor Stores, Inc., was dissolved on September 25, 1943 (Tr. 332, 442, Exhibit 51—d). This is the retail liquor store which respondent asserted petitioner controlled, and which in turn controlled the aforesaid outlets.

It is respectfully submitted that the various business transactions between the Standard Liquor Stores, Inc. and its outlets, or between the petitioner and said Standard Liquor Stores, Inc., or its outlets, after the death of Ray Levers as indicated in Exhibits 112 to 137 (Tr. 341) were not violations under the New Mexico Liquor Law (Appendix C herein); that these transactions were initiated prior to the appointment and qualifications of petitioner by the

Probate Court and under the said provisions of the New Mexico Law.

From the time of petitioner's appointment it is submitted the Probate Court had complete jurisdiction over the acts of the petitioner.

Under these circumstances it is respectfully suggested that the Circuit Court of Appeals has not given due consideration to the fact that the entire business in question was under the direction and control of a State Court and State laws.

Respectfully submitted,

HUSTON THOMPSON,
HUGH H. OBEAR,
Attorneys for Petitioner.

APPENDIX A.

Analysis of various cases in Federal courts involving annulment, suspension, revocation or denial of permits under the Federal Alcohol Administration Act, and contrast of these cases with the instant case.

In *Atlanta Beer Distributing Company, Inc.* v. *Alexander, Federal Alcohol Administrator* (1938), 93 F. (2) (certiorari denied, 303 U. S. 644), petitioner applied for a permit to engage in the business of purchasing at wholesale wine and malted liquors, etc. The hearing officer recommended denial of the application. Exceptions were filed and overruled by the Administrator.

The President-Treasurer of the Corporation had a criminal record consisting of five convictions in State and Federal courts. It was on this ground that the Administrator denied the application for a permit, saying "that the corporation was not likely to maintain its operations in conformity to federal law." The majority opinion of the Court stated that:

> "No objection to the order shall be considered by the court unless it shall have been urged before the Administrator, or there were reasonable grounds for failure so to do."

In contrast, in the instant case the question was (1) not the consideration of the *issuance* of basic permit No. 13-P-37, but the *annulment* of this permit issued approximately three years before; (2) applicant and his associates had never been convicted of a felony or misdemeanor in a Federal or State court nor had they had a suspension of a license.

Judge Hutcheson in his dissenting opinion uttered words that could well be considered in the instant case, when he said (p. 13):

> "The result of the action of the Administrator, therefore, in, as appellant claims, arbitrarily refusing a

permit is not to prevent applicant's entering into new business, *but it is to take from it* and destroy the established business and capital which it has already built up * * * I think that under the facts disclosed, the Administrator could not deny the permit except upon the clearest showing that one of the statutory grounds for refusing it existed." (Italics supplied.)

In *Arrow Distilleries* v. *Alexander* (1940), 109 F. (2) 397, (certiorari denied, 310 U. S. 646) the petitioner's license was suspended because (1) he had falsified certain records which were to be kept by the holders of basic permits; (2) misbranded bottles of whiskey by misdating their age; (3) sold spirits in bottles in interstate commerce for which the petitioner had received no certificate of label approval. Note that the permits were *suspended* but *not annulled,* so that the petitioner had the opportunity of rectifying any violations without having its business and assets destroyed.

In contrast, in the instant case, there is no substantial testimony showing that after the granting of basic permit No. 13-P-37 to officers of a court they knowingly and intentionally violated the law or regulations. The acts for which they were charged during that period such as "exclusive outlet" control and "tied house" inducements as in Sections 5a and 5b of the Act (U. S. C. A. Section 205(a) and (b) respectively), were certainly not as offensive to the law as were those in the above case. Nevertheless, the Supervisor did not *annul* the permit in the above case.

In the case of the *Middlesboro Liquor and Wine Company, Inc.* v. *Berkshire* (1942), 133 F. (2) 39, 77 U. S. App., D. C. 88, the facts were that a wholesaler's basic permit was issued to appellant. Four years later it was annulled, and appeal taken to the U. S. Court of Appeals for the District of Columbia. The appellant's permit was procured through fraud and concealment and misrepresentation of a material fact in that the true interest of Floyd Ball, the principal stockholder, member of its Board of Directors and Secretary-Treasurer was concealed, he being a person

with a criminal record, who had not divested himself of an interest in the Company.

In arriving at its decision the Court went very thoroughly into the record.

In the opinion, Justice Miller made a distinction between annullment proceedings and those for suspension or revocation. Referring to the limitations of Section 4(i) of the Act he said:

> "However, those limitations have no relation to annullment proceedings. They are specifically confined to proceedings for suspension or revocation. This is even more clearly shown by reference to Section 4(e) in which the three distinct types of disciplinary action are enumerated and defined. An entirely different situation exists when it appears that a permit has been procured by fraud, misrepresentation or concealment than when a permit has been properly procured but has been improperly used. Proceedings to suspend or revoke are concerned with nonuser or *misuser after the granting of the permit.*" (Italics supplied.)

In contrast, in the instant case, (1) there was no criminal record to consider; (2) the application for permit was made by the permittees, officers of a Court; (3) there was no substantial evidence that could be applied to these officers, not ony because Mr. Ray E. Levers, against whom most of the evidence was given, was dead, but because the applicants were either new or had completely changed their position and approached the Unit as officers of the Court, ordered by a Court to carry on the business. Therefore, the District Supervisor should in no sense have considered the case as one calling for annullment but, if at all, following the distinction made by Justice Miller, one of misuser after the granting of the permit.

In the case of *Monarch Distributing Company* v. *Alexander, et al.* (1941), 119 F. (2) 953, the question was the *refusal to grant* petitioner a basic permit. At the hearing on the application, subsequent to the date of the original petition but prior to final amendment thereof, it appeared that

petitioner and certain of its successive presidents had been convicted in the U. S. District Courts of felonies and misdemeanors. The only question involved was whether these convictions, secured after the date of filing the original petition, were a bar to the issuance of the permit, in view of the fact that the statute prohibits permits only to persons convicted "within five years prior to date of application." The court held that it was immaterial when the conviction occurred so long as it was within five years.

In contrast, in the instant case (1) the basic permit had already been issued, so the value of a going business was involved; (2) there was no question of criminal records; (3) applicants were in a totally different position from those in the above case and, if any correction of their acts was needed, it could have been handled easily under a suspension and not an annullment of a business that was within the active jurisdiction, control and supervision of a Court.

In the case of *Peoria Braumeister Company* v. *Yellowley*, (1941), 123 F. (2) 637 the basic permit to engage in sale and distribution of intoxicating liquors was *suspended*—not annulled. The charge was falsifying records and failure to keep records at its place of business. The case does not state in what respect petitioner falsified.

The position of the Government was that the respondent had no right to appeal to the court until it had exhausted its remedies before the Commissioner and the Department, as provided by the regulations.

In contrast the same charge is made in the instant case as in the above case, to wit, that the petitioner falsified its record. Yet the Commissioner on such a charge did not annul but only suspended the permit and thus gave the applicant an opportunity of correcting any mistakes or wrongs and not destroying the business of the petitioner outright.

In the case of *Malloy & Company* v. *Berkshire, et al.* (1944) (2nd Circuit) 143 F. (2) 218, (certiorari denied, 323 U. S. 802) the charge was that the dealer's basic permit

was procured by fraud and misrepresentation and concealment of material facts that justified annulling the permit. A questionnaire required the Corporation to state the amount of capital stock, addresses of directors, officers, stockholders, etc., whether the applicant was a successor or under substantially the same control or financed by substantially the same interests; the source of funds invested, the name and addresses of persons who held or were expected to hold a substantial interest.

Four of the stockholders who were officers and directors had been engaged in bootlegging during the prohibition years. The respectable names of Thomas J. Malloy, President, and one Bomzon, were being used as a front. Neither one had ever actually put any money into the Corporation, whereas four bootleggers were the real financiers.

The Court held that the hearing officer had ample justification for holding that there were concealments and misrepresentations that were material, because the money supplied and the principals had been connected with the bootleg business and that this had not been disclosed. The Court further said that the Administrator had the right to know with whom he was dealing.

In contrast in the instant case, the Alcohol Tax Unit knew that those applying for the permit were officers of the Court. Neither they nor their predecessors had had any bootlegging record nor had been found guilty of a felony or misdemeanor either under the Federal or State laws.

In the case of *Straus* v. *Berkshire* (1943), 132 F. (2) 530, the question was whether the Deputy Commissioner of Internal Revenue had the authority to *suspend* the permit for a period of ninety days. The permittee asserted (1) that the amount of the suspension was too great for the offense, (2) that the suspension for three months amounted to a revocation of the permit.

Permittee had failed to present any basis in the record for showing that the suspension was unreasonable, arbitrary and capricious. Nevertheless, the permittee sought to

have the case sent back to the administrative officer in order to introduce evidence to show that the suspension amounted to revocation.

In contrast the instant case (1) calls for complete annulment and not suspension; (2) the annulment in the instant case would mean complete annihilation of the business; (3) the record in the instant case does, under the circumstances, show the order to be unreasonable, arbitrary and capricious in that the application was made by officers of the court who were under the control of the court, whose record was clear of crime or misdemeanor and whose actions, if in any way wrong, could have been corrected during a suspension period; all of which was evident from the record.

In the case of *Leebern* v. *United States* (1941), 124 F. (2) 505, the facts were that the petitioner violated the provisions of Section 5 (b) of the Act by furnishing money to retail liquor dealers to buy licenses, endorsing and guaranteeing their notes, acquiring and holding an interest in their licenses, acquiring an interest in real and personal property owned, occupied and used by them in the conduct of their business, furnishing money, renting and selling them equipment, fixtures, supplies, etc., all of which was done to prevent other persons from selling to these retailers. For these violations the permit was suspended for *only* sixty days. The court held that:

> "It functions as a tribunal of last resort set up in the statute itself for correction of errors of law committed and not corrected, in the course of the administrative procedure."

In contrast, let us assume in the instant case, that the transcript shows a case as strongly and frequently violative of the law as in the *Leebern* case. Nevertheless, the District Supervisor did not annul the permit but only suspended it for sixty days.

In *Owens Mills Distillery Inc.* v. *Helvering* (1941), 124 F. (2) 379, with the exception that the existing permit was revoked and applications for new permits denied, there is no

resemblance whatsoever to the situation and facts presented, with those in the instant case. In the Owens Mills case, the petitioner corporation, and its former president Lansburgh, who was its principal stockholder, and his son, were convicted of violations of the Federal liquor laws on July 3, 1940.

Lansburgh then sold his stock and that of his family to James Pollack and Benjamin Lerner and others. Pollack and Lerner and their group thus became the principal stockholders and controlled the corporate elections.

The sole question involved was whether or not the denial of petitioner corporation's applications for permit was proper, upon the basis of the findings of the direct supervisor.

In the Owens Mills case there are the following facts: (1) A corporation with its president and controlling stockholders convicted of violation of the law; (2) The president then transfers the stock of his group to a group of crooked stockholders in the same corporation who thereby gain control of the corporation; (3) These latter crooked stockholders had been convicted of violations of the law. Pollack had been convicted sixteen times of violations of the liquor law, and Lerner had also been convicted; (4) Their record was open and notorious; (5) Pollack and Lerner had attempted to bribe the government investigators and had threatened them and their jobs with extinction and the use of political power; (6) The only change in the status of the corporation was that one group of crooked stockholders sold out to another group when the government had annulled the license. So there was a continuing line of crookedness in the corporation.

In contrast, the instant case shows the following: (1) The petitioner had not been convicted of violation of a Federal or State law; (2) The petitioner had, during all the time in question, owned two state licenses; (3) The State had a liquor law that covered all transactions in intra-state commerce; (4) The petitioner was a duly appointed, bonded

and qualified *officer of a State Court of Competent jurisdiction.* He was ordered to carry on the business and to report to the State Court regularly. If "exclusive sale" or "tied house" contracts existed they did so under the jurisdiction and control of the State Court and were thereby freed of the color of violation. All of these facts were known publicly, and the supervisor himself had been the one that recommended that the administrator of the Court should apply for the new licenses, after the death of Ray Levers, a brother of Forest Levers and a partner; (5) There was a change of position and control on the part of those supervising the partnership assets.

APPENDIX B.

A. The Act.

The Federal Alcohol Administration Act, 49 Stat. 977 (27 U. S. C. 201) provides in part as follows:

SEC. 3. * * * (a) It shall be unlawful, except pursuant to a basic permit issued under this Act by the Administrator—

(1) to engage in the business of importing into the United States distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so imported.

* * * * * * * * *

(c) It shall be unlawful, except pursuant to a basic permit issued under this Act by the Administrator—

(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to receive or to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so purchased.

* * * * * * * * *

SEC. 4. (a) The following persons shall, on application therefor, be entitled to a basic permit:

(1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.

(2) Any other person unless the Administrator finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experi-

ence financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

(b) If upon examination of any application for a basic permit the Administrator has reason to believe that the applicant is not entitled to such permit, he shall notify the applicant thereof and, upon request by the applicant, afford him due notice and opportunity for hearing on the application. If the Administrator, after affording such notice and opportunity for hearing, finds that the applicant is not entitled to a basic permit hereunder, he shall by order deny the application stating the findings which are the basis for his order.

* * * * * * * * *

(d) A basic permit shall be conditioned upon compliance with the requirements of section 5 (relating to unfair competition and unlawful practices) and of section 6 (relating to bulk sales and bottling), with the twenty-first amendment and laws relating to the enforcement thereof, and with all other Federal laws relating to distilled spirits, wine, and malt beverages, including taxes with respect thereto.

(e) A basic permit shall by order of the Administrator, after due notice and opportunity for hearing to the permittee, (1) be revoked, or suspended for such period as the Administrator deems appropriate, if the Administrator finds that the permittee has willfully violated any of the conditions thereof, provided that for a first violation of the conditions thereof the permit shall be subject to suspension only; or (2) be revoked if the Administrator finds that the permittee has not engaged in the operations authorized by the permit for a period of more than two years; or (3) be annulled if the Administrator find that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order.

* * * * * * * * *

(g) A basic permit shall continue in effect until suspended, revoked, or annulled as provided herein, or vol-

untarily surrendered; except that (1) if leased, sold or otherwise voluntarily transferred, the permit shall be automatically terminated thereupon, and (2) if transferred by operation of law or if actual or legal control of the permittee is acquired, directly or indirectly, whether by stock-ownership or in any other manner, by any person, then such permit shall be automatically terminated at the expiration of thirty days thereafter: *Provided*, That if within such thirty-day period application for a new basic permit is made by the transferee or permittee, respectively, then the outstanding basic permit shall continue in effect until such application is finally acted on by the Administrator.

(h) An appeal may be taken by the permittee or applicant for a permit from any order of the Administrator denying an application for, or suspending, revoking, or annulling, a basic permit. Such appeal shall be taken by filing, in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon the Administrator, or upon any officer designated by him for that purpose, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. The finding of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in

such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Administrator shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347). The commencement of proceedings under this subsection shall, unless specifically ordered by the court to the contrary, operate as a stay of the Administrator's order.

* * * * * * * * *

SEC. 5. It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

(a) *Exclusive outlet:* To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or

(b) *"Tied house":* To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt bev-

erages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: (1) By acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (2) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; or (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Administrator shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection; or (4) by paying or crediting the retailer for any advertising, display, or distribution service; or (5) by guaranteeing any loan or the repayment of any financial obligation of the retailer; or (6) by extending to the retailer credit for a period in excess of the credit period usual and customary to the industry for the particular class of transactions, as ascertained by the Administrator and prescribed by regulations by him; or (7) by requiring the retailer to take and dispose of a certain quota of any of such products; or

APPENDIX C.

NEW MEXICO STATUTES OF 1941 ANNOTATED VOLUME 5.

61-504. Wholesalers' license—No wholesaler shall sell, or offer for sale, any alcoholic liquors to any person other than the holder of a New Mexico wholesaler's, retailer's, dispenser's or club license (New Mexico Statutes, 1941).

61-514. Persons prohibited from receiving licenses—"(a) The following classes of persons shall be prohibited from receiving licenses under the provisions of this Act: (1) Persons who have been convicted of two (2) separate misdemeanor violations of this Act in any calendar year or of any felony, except those persons restored to civil rights." * * *.

61-518. No such wholesaler shall sell, offer for sale, or ship, any alcoholic liquors not received at, and shipped from, the premises specified in such wholesale license, except beer as provided in Section 705.

61-911. * * * *Exemptions.* (C)(4) "spirituous liquors, beer or wine to be sold by any officer under the order or direction of any court."

61-912. *Quitting business or death of licensee*—Sales to other dealers or dispensers without liability—In case any retailer, dispenser or club shall quit business for any reason, or in case of the death of any such licensee, the stock of liquors owned at the time of such quitting of business, or at the death of such licensee, may be sold in whole or in part to any other retailer, dispenser or club or to any New Mexico wholesaler without the seller thereof incurring any criminal or civil liability under the provisions of this Act (Laws 1939, ch. 236, Section 1501, p. 566).

61-914. Return to wholesaler or non-resident licensee is not a sale.—No return of, or repossession of, any stock of, or part of any stock of, alcoholic liquors to, or by, any licensed New Mexico wholesale liquor dealer shall be construed as a sale within the meaning of any provision of this Act. The same rule shall apply in case of the return or repossession of any alcoholic liquors to, or by, a non-resident licensee, by or from any New Mexico wholesale liquor dealer (Laws 1939, ch. 236, Section 1503, p. 566).

No. 1231

In the Supreme Court of the United States

OCTOBER TERM, 1945

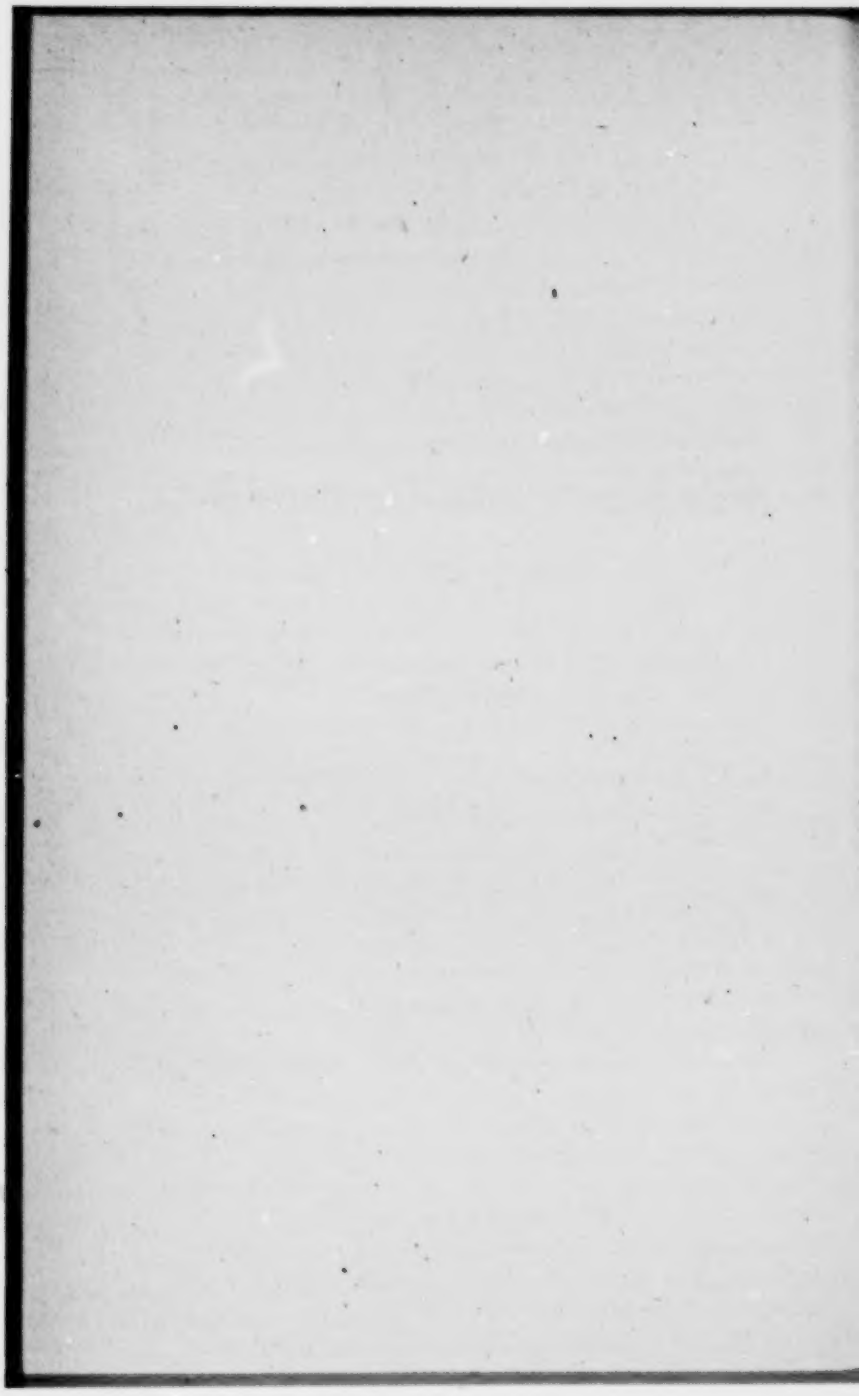
FOREST E. LEVERS, ADMINISTRATOR, ETC.,
PETITIONER

v.

A. V. ANDERSON, DISTRICT SUPERVISOR, ALCOHOL TAX UNIT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION



INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1231

FOREST E. LEVERS, ADMINISTRATOR, ETC., PETITIONER

v.

A. V. ANDERSON, DISTRICT SUPERVISOR, ALCOHOL TAX UNIT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 458–463) is reported in 153 F. 2d 1008.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 12, 1946 (R. 463). A petition for rehearing (R. 464–465) was denied on March 27, 1946 (R. 465). The petition for writ of certiorari was filed in this Court on May 15, 1946. The jurisdiction of this Court is invoked

under Section 4 (h) of the Federal Alcohol Administration Act (c. 814, 49 Stat. 977) and Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there is presented the question whether the evidence shows a substantial restraint or prevention of transactions in interstate commerce within the meaning of Sections 5 (a) and 5 (b) of the Federal Alcohol Administration Act?

2. Whether consistent with the Twenty-First Amendment, the Federal Government may refuse to grant a permit to engage in interstate commerce in intoxicating liquors to a person who is engaged in intrastate transactions with respect to such liquors which restrain interstate commerce, when such intrastate activities are unlawful under the laws of the state in which they take place.

3. Whether the annulment of a basic permit held by an administrator of an estate and the refusal to issue new permits to him, is a denial of due process of law when the annulled permit was procured by fraud and the operations proposed by the requested new permits are likely not to be maintained in conformity with Federal law.

STATUTE AND REGULATIONS INVOLVED

The Twenty-First Amendment, the pertinent provisions of the Federal Alcohol Administration

Act, 49 Stat. 977, 27 U. S. C. 201, and of the laws of the State of New Mexico relating to intoxicating liquors are printed in the Appendix, *infra*, pp. ——.

STATEMENT

Pursuant to the provisions of Section 4 (a) of the Federal Alcohol Administration Act, Forest E. Levers and Ray E. Levers, d/b/a Levers Brothers, applied for and, on March 21, 1936, were issued a wholesaler's basic permit (R. 153). On October 1, 1941, Ray E. Levers died (R. 154). On October 6, 1941, the Probate Court of Chaves County, New Mexico, appointed Forest E. Levers "Special Administrator of the Estate of Ray E. Levers * * * insofar as the partnership assets in the firm of Levers Brothers is concerned" (R. 160). On October 10, 1941, Oran C. Dale, the only son-in-law of Ray Levers, was "appointed co-administrator with F. E. Levers to administer the partnership assets" of Ray Levers (R. 168). Thereafter in accordance with the requirements of Section 4 (g) of the Act, Forest E. Levers and Dale applied for and, on December 26, 1941, were issued a new wholesaler's basic permit (R. 170).

On November 5, 1943, respondent, District Supervisor, acting pursuant to Section 4 (e) of the Act, issued an order to show cause why this basic permit should not be annulled (R. 146).

On November 15, 1943, Dale was discharged by the Probate Court as co-administrator (R. 179),

thereby making it necessary, under Section 4 (g) of the Act, for Forest E. Levers to apply for a new permit. On November 29, 1943, Forest E. Levers, as co-partner and Special Administrator, applied for a new wholesaler's basic permit and for an importer's basic permit (R. 171, 181). On December 18, 1943, pursuant to Section 4 (b), respondent issued a notice of contemplated denial of each of these two applications (R. 180, 191, 198).

The order to show cause why the wholesaler's basic permit issued to Forest Levers and Oran Dale in December 1941 should not be annulled charged that petitioner Levers and Oran Dale procured it by concealing and misrepresenting material facts [1] relating to the ownership or control of another corporation and to the ownership or control in violation of Sections 5 (a) and 5 (b) of the Act, of outlets selling alcoholic beverages at retail (R. 146–148). The notices of contemplated denial of Forest Levers' applications for a wholesaler's and importer's basic permit charged that evidence in the possession of the Alcohol Tax Unit concerning the way in which certain phases of the business had been carried on was persuasive that the business proposed to be carried on would not be maintained in conformity with Federal law (R. 180–181, 191, 193).

[1] Petitioner erroneously implies that the concealments and misrepresentations were by predecessors of petitioner and made in procuring a permit in 1936 (Br. pp. 3, 15).

In a letter to petitioner giving more fully the reason for the contemplated denial of the applications (R. 193–194), respondent stated he was of the view that practices exist that would be continued in violation of Sections 5 (a) and (b) of the Act; that these practices result in control of certain retail outlets for alcoholic beverages in the State of New Mexico, that such control "affects the purchasing policy of these outlets" as to liquors moving in interstate commerce and that "Levers Brothers would continue to control the path" of such liquor to their own advantage and the disadvantage of others (R. 198–199).

Petitioner requested a hearing on the order to show cause and on each of the two notices of contemplated denial (R. 193–194). The hearings in the three proceedings were consolidated (R. 4–6). Although petitioner took part in the hearing, he introduced no evidence in his behalf. The Hearing Officer rendered a consolidated report (R. 377–421) in which he found: (1) Levers Brothers openly owned and controlled retail liquor stores prior to the passage of the Federal Alcohol Administration Act (R. 393–394); (2) Levers Brothers has concealed and continued this ownership and control ever since the passage of the Act (R. 419–420); (3) Levers Brothers has controlled the buying power of these stores and of others financially obligated to it and has insisted that practically all of their purchases be made from Levers Brothers (R. 419–420);

(4) Forest Levers and Oran Dale knowingly concealed this material fact in their application for the Wholesaler's Basic Permit issued to them in 1941 and thereby procured its issuance (R. 419, 420–421); (5) Forest Levers knowingly concealed this fact in his 1943 application for a wholesaler's and for an importer's basic permit. The petition does not urge that these findings are unsupported by the evidence.

The respondent approved these findings (R. 422) and further found that the Wholesaler's Permit issued in 1941 had been procured by concealment of material fact and was subject to annulment under Section 4 (e) (3) of the Act (R. 421–422), and that the operations proposed under the wholesaler's and importer's basic permits applied for in 1943 were not likely to be maintained in conformity with Federal law for the reasons set forth in the notices of contemplated denial (R. 424, 426).

Without availing himself of available procedures for administrative relief, petitioner filed his petition for review in the Circuit Court of Appeals (R. 1–3), which, without considering the merits, dismissed the petition for failure to exhaust administrative remedies (R. 457, 459). This Court reversed the judgment of the Court of Appeals and remanded the case for hearing on the merits (R. 456–458). Upon hearing on the merits, the court below affirmed the orders of the District Supervisor (R. 458–463).

ARGUMENT

Of the questions now claimed to be presented, only one—the question relating to interstate commerce—was presented to the District Supervisor or to the Circuit Court of Appeals.[2] Section 4 (h) of the Act[3] and the practice in this Court limiting review to questions passed upon by the court below both operate to confine review in this case to that question.[4] We shall nevertheless also briefly note the lack of substance in the other questions claimed to be presented.

I

The question whether the evidence shows that Levers Brothers' control of various retail outlets

---

[2] See R. 2. The petition for review filed in the Circuit Court of Appeals challenges respondent's "power and jurisdiction to annul petitioner's permit or to refuse to issue a permit to him" (R. 2), but the consistent basis of this challenge has been that such power would be an unconstitutional invasion of the right of a state to regulate the administration of estates. (Brief submitted to Hearing Officer; Brief in Circuit Court of Appeals.) This contention is adequately disposed of in the opinion of the court below (R. 461).

[3] "No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do."

[4] Petitioner, in challenging the construction of the regulations relating to administrative review adopted by the Circuit Court of Appeals, argued that resort to such procedures should not be required when, like petitioner, a person was not raising any objection to the order not already presented to the respondent (Pet. Br. p. 17).

substantially restrains or prevents interstate commerce need not be determined in this case. The issue in the annulment proceedings was whether petitioner procured the wholesaler's basic permit in 1941 by concealing or misrepresenting a material fact. The evidence showed, and respondent made the now unchallenged finding, that petitioner knowingly falsely denied that Levers Brothers controlled various retail outlets and their buying policies (R. 420–421). Withholding this information deprived respondent of knowledge which would have enabled him, either with or without further investigation, to perform his statutory duty of determining whether the proposed business would likely be maintained in conformity with Federal law. This is the test of materiality. It is not whether the facts now shown to have been concealed establish petitioner's ineligibility for the permit. Furthermore, one who procures or applies for a permit on the basis of false statements can not complain if the permit is annulled or denied upon discovery of the fraud. This has been held to be so even irrespective of whether the underlying statute is constitutional. *United States* v. *Kapp*, 302 U. S. 214; *Kay* v. *United States*, 303 U. S. 1; *Capitol Wine & Spirits Co.* v. *Berkshire*, 150 F. 2d 619, certiorari denied 66 S. Ct. 896. The fraud in petitioner's applications thus makes it immaterial whether petitioner's conduct affected interstate commerce.

The issue in each of the application proceedings was not, as petitioner assumes, whether the operations now conducted by petitioner were in violation of Sections 5 (a) or 5 (b). The issue was whether petitioner was likely to maintain operations in conformity with Federal law. On this issue the evidence showed and the respondent made the unchallenged finding of long continued hidden ownership or control of retail outlets (which was in violation of state law (*infra*, p. —) and of Federal law when interestate commerce is affected), deliberately concealed in all the various Federal permit applications from 1935 through 1943 (R. 420–421). The evidence further showed that the number of controlled retail outlets was not static (R. 368, 103–104, 88, 93); that the seven outlets controlled in 1943 purchased almost 15,560 wine gallons of distilled spirits from June 1 through October 1943 (R. 368–372); and that the controlled outlets in normal times could have sold more distilled spirits and beer if they had been free to purchase brands handled by others than Levers Brothers (R. 72, 97–8).

If the interstate commerce contention is to be considered, the limited question presented is whether there can be a violation of Sections 5 (a) or 5 (b) when the exclusive or tied outlets are located in the same state as the wholesaler to which they are tied and all other wholesalers from which the outlets could legally purchase intoxicating beverages. All the liquor, of course, was purchased by the wholesalers outside the state, and the ownership of outlets obviously diverts the interstate flow to the law violator and

away from his competitors. See R. 463. It is settled that restraints upon intrastate sales may restrain interstate commerce. *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293.

II

The contention that the holding of the court below subordinates the liquor laws of the State of New Mexico to those of the Federal Government and is therefore in conflict with the policy expressed by this Court in *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, is without merit. The holding below does not prevent petitioner from engaging in the wholesale liquor business within New Mexico. The implication that the refusal to grant permits under the Federal law to purchase intoxicating liquors in interstate commerce is, as a practical matter, in view of the absence of producers of such liquors in New Mexico, a nullification of the authority granted by the state, is obviously immaterial.[5]

The grant of permission by New Mexico to engage in the wholesale liquor business cannot carry with it a grant of permission to engage in interstate commerce in defiance of a Federal law. The Twenty-first Amendment does no more than remove the barrier of the commerce clause to state legislation which, in furtherance of local

[5] It may be noted that the laws of New Mexico specifically authorize one New Mexico wholesaler to buy from another New Mexico wholesaler. New Mexico Statutes, Sec. 61–504.

policy, blocks interstate highways to intoxicating liquors. *United States* v. *Frankfort Distilleries, Inc., supra.* The Federal Government may enact legislation conditioning the right to engage in interstate commerce in such liquors when the legislation does not nullify or conflict with state law. The Federal Alcohol Administration Act has conditioned the right to engage in interstate commerce on compliance with Sections 5 (a) and (b) of the Act which prohibit exclusive outlets and "tied houses" under circumstances which restrain interstate commerce.

In any event, New Mexico itself prohibits exclusive outlets and "tied houses" under these and other circumstances. New Mexico Statutes, 1941, Sec. 61–908.[6] The effect of the holding below therefore is not to subordinate but to implement state policy.

[6] The substantial identity of language between Sections 5 (a) and 5 (b) of the Act and Section 61–908 of the New Mexico Statutes, 1941, clearly indicates that the New Mexico prohibitions against exclusive outlets and "tied houses" were copied from Sections 5 (a) and (b) of the Act.

III

The contention that the revocation of a permit procured by fraud and the denial of other permits for operations which, it has been found, will probably not be conducted in accordance with Federal law, is so severe as to constitute an abuse

of discretion and a denial of due process requires no discussion.[7] Neither does the suggestion that the proper course for the respondent to have pursued was to disregard the remedies specified, and the duties imposed upon him, by Congress and "bring this matter to the attention of the [Probate] court and had petitioner removed as an administrator" (Pet. p. 21).

CONCLUSION

The decision presents no questions meriting review by this Court and is clearly correct. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

MAY 1946.

---

[7] Insofar as the plea for clemency is based upon petitioner's claimed freedom from a criminal record (Pet. 7, 20), we wish to point out that there is nothing in the record which supports this statement. The Transcript of Record filed in the Circuit Court of Appeals for the Tenth Circuit in another case instituted by Forest E. Levers to review a subsequent order of Stewart Berkshire denying an application for a wholesaler's basic permit, shows that Forest E. Levers was fined $100 for contempt of the District Court of Chaves County, New Mexico, for attempting to obstruct justice by preventing a minor from testifying as a witness in a criminal case charging one of the retail outlets controlled by Levers Brothers with selling intoxicating liquor to such minor. *Levers* v. *Anderson*, No. 3321 C. C. A. 10, Tr. pp. 235–240.

APPENDIX A

United States Constitution

AMENDMENT XXI

SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

APPENDIX B

The Federal Alcohol Administration Act, 49 Stat. 977 (27 U. S. C. 201 et seq.) provides in part as follows:

> SEC. 3. * * * (a) It shall be unlawful, except pursuant to a basic permit issued under this Act by the Administrator—
>
> (1) to engage in the business of importing into the United States distilled spirits, wine, or malt beverages; or
>
> (2) for any person so engaged to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so imported.
>
> * * * * * *
>
> (c) It shall be unlawful, except pursuant to a basic permit issued under this Act by the Administrator—
>
> (1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages; or
>
> (2) for any person so engaged to receive or to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through

an affiliate, distilled spirits, wine, or malt beverages so purchased.

* * * * *

SEC. 4. (a) The following persons shall, on application therefor, be entitled to a basic permit:

(1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.

(2) Any other person unless the Administrator finds

(A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

(b) If upon examination of any application for a basic permit the Administrator has reason to believe that the applicant is not entitled to such permit, he shall notify the applicant thereof and, upon request by the applicant, afford him due notice and opportunity for hearing on the application. If the Administrator, after affording such notice and opportunity for hearing, finds that the applicant is not entitled to a basic permit hereunder, he shall by order deny

the application stating the findings which are the basis for his order.

* * * * *

(d) A basic permit shall be conditioned upon compliance with the requirements of section 5 (relating to unfair competition and unlawful practices) and of section 6 (relating to bulk sales and bottling), with the twenty-first amendment and laws relating to the enforcement thereof, and with all other Federal laws relating to distilled spirits, wine, and malt beverages, including taxes with respect thereto.

(e) A basic permit shall by order of the Administrator, after due notice and opportunity for hearing to the permittee, (1) be revoked, or suspended for such period as the Administrator deems appropriate, if the Administrator finds that the permittee has willfully violated any of the conditions thereof, provided that for a first violation of the conditions thereof the permit shall be subject to suspension only; or (2) be revoked if the Administrator finds that the permittee has not engaged in the operations authorized by the permit for a period of more than two years; or (3) be annulled if the Administrator finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order.

* * * * *

(g) A basic permit shall continue in effect until suspended, revoked, or annulled as provided herein, or voluntarily surrendered; except that (1) if lease, sold or otherwise voluntarily transferred, the permit shall be automatically terminated thereupon, and (2) if transferred by operation

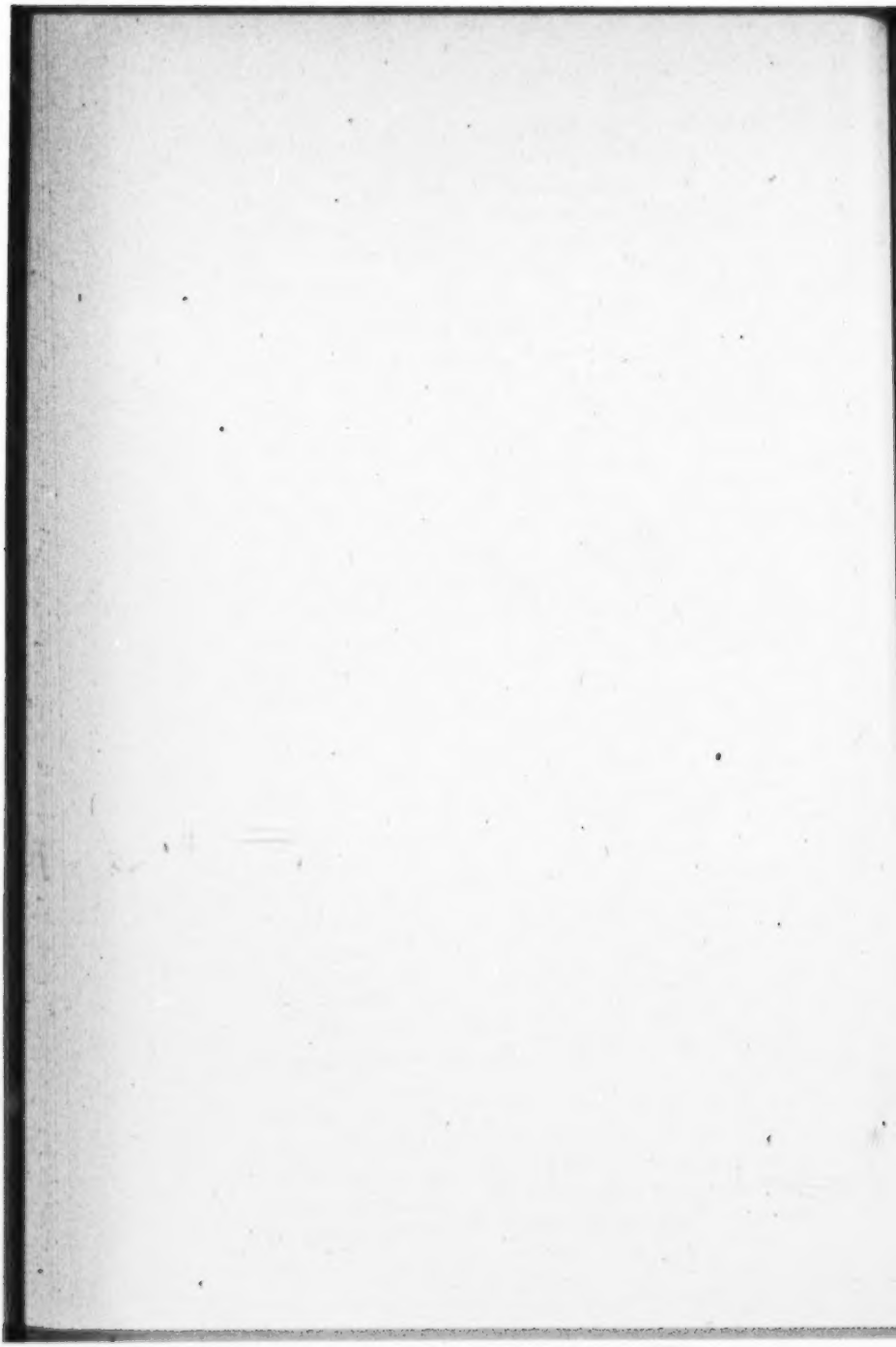
of law or if actual or legal control of the permittee is acquired, directly or indirectly, whether by stock-ownership or in any other manner, by any person, then such permit shall be automatically terminated at the expiration of thirty days thereafter: *Provided,* That if within such thirty-day period application for a new basic permit is made by the transferee or permittee, respectively, then the outstanding basic permit shall continue in effect until such application is finally acted on by the Administrator.

(h) An appeal may be taken by the permittee or applicant for a permit from any order of the Administrator denying an application for, or suspending, revoking, or annulling, a basic permit. Such appeal shall be taken by filing, in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon the Administrator, or upon any officer designated by him for that purpose, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript, such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure

so to do. The finding of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Administrator shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347). The commencement of proceedings under this subsection shall unless specifically ordered by the court to the contrary operate as a stay of the Administrator's order.

* * * * *

SEC. 5. It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of



distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

(a) *Exclusive outlet:* To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or

(b) "Tied house": To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such

products to such retailer in interstate or foreign commerce: (1) By acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (2) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; or (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Administrator shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection; or (4) by paying or crediting the retailer for any advertising, display, or distribution service; or (5) by guaranteeing any loan or the repayment of any financial obligation of the retailer; or (6) by extending to the retailer credit for a period in excess of the credit period usual and customary to the industry for the particular class of transactions, as ascertained by the Administrator and prescribed by regulations by him; or (7) by requiring the retailer to take and dispose of a certain quota of any of such products; or

* * * * *

APPENDIX C

NEW MEXICO STATUTES OF 1941
ANNOTATED, VOLUME 5

61-908. Unfair competition—Exclusive outlet—Tied house—Consignment sales.—It shall be un-

lawful for any importer, distiller, brewer, rectifier, winer, nonresident licensee, or any kind or class of wholesale licensee, directly or indirectly, or through an affiliate:

(a) Exclusive outlet: To require by agreement or otherwise that any wholesale, retail, dispensary or club licensee engaged in the sale of any alcoholic liquor in the state of New Mexico, purchase any such products from such person to the exclusion in whole or in part of alcoholic liquors sold or offered for sale by other persons; or

(b) Tied house: To induce through any of the following means, any wholesale liquor dealer, retail liquor dealer, dispenser or club engaged in the sale of any kind of class of alcoholic liquors to purchase any such products from such person to the exclusion in whole or in part of alcoholic liquors sold or offered for sale by other persons:

(1) By acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the wholesale liquor dealer, retail liquor dealer, dispenser or club; or

(2) By acquiring any interest in any real or personal property owned, occupied or used by any wholesale liquor dealer, retail liquor dealer, dispenser or club in the conduct of the buying wholesaler's, retailer's, dispenser's or club's liquor business, subject to such exceptions as the chief of division of liquor control shall prescribe, having due regard to the free flow of commerce, the purpose of this subsection and established trade customs not contrary to the public interest; or

(3) By furnishing, giving, renting, lending or selling to any wholesale liquor dealer, retail liquor

dealer, dispenser or club any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the chief of division of liquor control shall by regulation prescribe, having due regard for public health and welfare, the quantity and value of the articles involved and established trade customs not contrary to the public interest and the purposes of this subsection; or

(4) By paying or crediting the wholesale liquor dealer, retail liquor dealer, dispenser or club for any advertising, display or distribution services; or

(5) By extending credit to any wholesale liquor dealer, retail liquor dealer, dispenser or club in any amount to aid or allow such person to commence business or to secure any part of a stock of merchandise with which to commence business in the first instance; or

(6) By requiring any wholesale liquor dealer, retail liquor dealer, dispenser or club to take and dispose of a certain quota or combination of alcoholic liquor products; or

(7) Commercial bribery: To induce by or through any of the following means any wholesale liquor dealer, retail liquor dealer, dispenser or club to purchase any alcoholic liquor products from such person to the exclusion in whole or in part of any alcoholic liquors sold or offered for sale by other persons:

(1) By commercial bribery; or

(2) By offering or giving any bonus, premium or compensation to any officer, employee, agent or representative of any wholesale liquor dealer, retail liquor dealer, dispenser or club; or

(c) Consignment sales: To sell, offer for sale or contract to sell any retail liquor dealer, dispenser or club any alcoholic liquors of any kind or class on consignment or under a conditional sale or on any basis other than a bona fide sale: Provided, that this subsection shall not apply to transactions involving solely the bona fide return of merchandise for ordinary and usual commercial reasons arising after the merchandise has been sold.

U. S. GOVERNMENT PRINTING OFFICE: 1946